UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 06-CV-12085-JLT

LUKA ALMONTE,

Petitioner

v.

BERNARD BERRY, SUPERINTENDENT, OLD COLONY CORRECTIONAL CENTER,

Respondent

REPORT AND RECOMMENDATION ON PETITION FOR WRIT OF HABEAS CORPUS
(Docket # 1)

ALEXANDER, M.J.

A. Procedural Background

On June 24, 2002 Petitioner Luka Almonte[1] ("Almonte") was convicted by an Essex Superior Court jury of first degree murder in the death of Jose Luis Antigua. ("Antigua"). The conviction was based upon theories of deliberate premeditation and extreme atrocity or cruelty. That same day he was sentenced to life imprisonment. He received direct appellate review from the Massachusetts Supreme Judicial Court

[1]The Petitioner is also known as "Mellizo"

("SJC") where his conviction was affirmed. See Commonwealth v. Almonte, 444 Mass. 511 (2005). Almonte appealed his conviction to the United State Supreme Court, but his petition for certiorari was denied. Almonte v. Massachusetts, 126 S.Ct. 750 (2005). Having exhausted his state law remedies, Almonte petitioned this Court for a writ of habeas corpus on November 17, 2006, pursuant to 28 U.S.C. § 2254, 28 U.S.C. § 1651, and U.S. Const. Art. I, § 9 para. 2. On January 24, 2007 District Judge Tauro referred this case this Court for a Report and Recommendation on disposition of this petition.

B. Factual History[2]

In the early morning of July 17, 1990, Almonte went to Antigua's apartment regarding the $1,000 Almonte owed him. Once outside the apartment, Almonte yelled for Antigua to come outside, stating "I'm going to pay you [the] money." The noise caught the attention of Angel Rosario and Ana Guzman, two of Antigua's neighbors. Rosario saw Almonte outside the victim's window and Guzman saw Antigua and Almonte speaking in a stairwell area.

Moments later, both neighbors heard gunshots. Through her window, Guzman saw Almonte chasing Antigua with a gun in hand and ultimately shoot him in the back. After being shot, Antigua fell and got back up, then tried, without success, to get into

[2]This factual history is taken from the SJC opinion.

the locked apartment building. Antigua then ran to another apartment building but, unfortunately, that building was also locked. While Guzman yelled for Almonte to stop, her request proved futile as Almonte shot Antigua again. Almonte then took aim at Guzman and pulled the trigger, but the gun did not fire. After Almonte had fled the scene,[3] Guzman approached a conscious Antigua and heard him utter his dying declaration, "Mellizo shot me. My cousin kill me." Antigua bled to death after having been shot five times.

Ten years later, at 10:15 p.m. on September 16, 2000, Almonte walked into the Manhattan South Task Force Base, a police substation in New York City, asking for anyone who spoke Spanish. He was directed to Officer Ivan Rivera's desk. Almonte told Officer Rivera that a few years earlier he owed money to a drug dealer and that a fight broke out leaving someone dead. He also claimed that there was an outstanding warrant for his arrest. Carrying a Bible in hand, Almonte explained that he wanted to "come clean" and that he had "found God."

Upon confirming the existence of the arrest warrant, Officer Rivera arrested Almonte and escorted him to a precinct station for processing. There, Almonte was taken to the detective bureau where he met with Detectives Rice and Saffos and was given something to eat and drink. A conversation ensued with Officer Rivera serving

[3]At this time, Rosario saw Almonte, armed with a small handgun, chasing Antigua's relative.

as interpreter.[4]

During this interview, Almonte was advised of his Miranda rights through a form printed in Spanish. The detectives read from the form as Almonte looked at a copy. After the final question, which asked if he would answer questions, Almonte stated "I believe I've said what I have to say." He was then asked if he would answer some additional questions. Almonte agreed, and the detectives, through Officer Rivera, questioned Almonte, who proceeded to make several incriminating statements.

C. Discussion

I. Standard of Review

As this habeas petition was filed after April 24, 1996, this Court's review is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA")[5]. Woodford v. Garceau, 538 U.S. 202, 210 (2003). AEDPA introduced many changes to the federal habeas statute,[6] requiring that there now be a "presumption of correctness of state court factual findings" and a new "highly deferential standard for evaluating state-court rulings." Lindh v. Murphy, 521 U.S. 320, 334 n.7 (1997); see also Woodford v. Visciotti, 537 U.S. 19, 24 (State court decisions should be given the "benefit of the

[4]Although the SJC noted that there were differences between the Spanish spoken by Officer Rivera and the Spanish spoken by Almonte, it found that the dialects were not dissimilar so as to have caused communication problems between them.

[5]Pub. L. No. 104-132, 110 Stat. 1214 (1996)

[6]28 U.S.C. § 2254

doubt"). Thus, after passage of the Act, a federal court may not provide habeas relief to a state prisoner unless the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." See 28 U.S.C. § 2254(d)(1); O'Brien v. Dubois, 145 F.3d 16, 24 (1st Cir. 1998).

A state court decision is contrary to clearly established federal law "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases or if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent." Lockyer v. Andrade, 538 U.S. 63, 73 (2003), (quoting Williams v. Taylor, 529 U.S. 362, 405-06 (2000)); see also Mello v. Dipaulo, 295 F.3d 137, 142-43 (1st Cir. 2002).

A state court decision involves an unreasonable application of Supreme Court precedent "if the state court identifies the correct governing legal principle from the Supreme Court decisions but unreasonably applies that principle to the facts of the prisoner's case." Smiley v. Maloney, 422 F.3d 17, 20 (1st Cir. 2005) (quoting Williams v. Taylor, 529 U.S. at 413); see also McCambridge v. Hall, 303 F.3d 24, 33 (1st Cir.

2002) (en banc). It is not enough that the state court decision applied the federal law incorrectly; it must have been applied unreasonably, producing an unreasonable result. See L'Abbe v. DiPaolo, 311 F.3d 93, 96 (1st Cir. 2002); Williams v. Taylor, 529 U.S. at 411 (emphasizing Congress's use of the word "unreasonable" in AEDPA as opposed to "erroneously" or "incorrectly"). In order for the federal court to find the state court's decision unreasonable, "it must be so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." Vieux v. Pape, 184 F.3d 59, 66 (1st Cir. 1999) (quoting O'Brien, 145 F.3d at 25).

II. Analysis[7]

A. The Supreme Judicial Court's decision was not contrary to the Supreme Court's holding in Smith v. Illinois.

It is a central principle of Fifth Amendment jurisprudence that law enforcement officers must terminate an interrogation immediately upon an accused's unequivocal invocation of the right to remain silent. See Miranda v. Arizona, 384 U.S. 436 (1966); Edwards v. Arizona, 451 U.S. 477 (1981). Where an accused desires to invoke his right to counsel, he must state it in unambiguous terms. Davis v. United States, 512 U.S. 452, 458-59 (1994). While the First Circuit has never addressed the question whether the

[7]In this Analysis section, for clarity, all statements made by defendants in the cases cited will be italicized.

Davis requirement applies in the right-to-remain-silent context, see James v. Marshall, 322 F.3d 103, 108 (1st Cir. 2003) and Bui v. DiPaolo, 170 F.3d 232, 239 (1st Cir. 1999), many courts in the First Circuit "have found that the Davis analysis applies to a suspect's invocation of his right to remain silent." United States v. Teemer, 267 F. Supp. 2d 187, 195 (D. Me. 2003). The United States District Court for the District of Massachusetts is one of those courts. See United States v. Reid, 211 F. Supp. 2d 366 (D. Mass. 2002) (Young, C.J.).

The Supreme Judicial Court found Almonte's statement "*I believe I've said what I have to say,*" when taken into consideration with the circumstances immediately before and after this statement, warranted a finding that Almonte did not invoke his right to remain silent. Commonwealth v. Almonte, 444 Mass. at 518-19. Almonte takes issue with this conclusion, arguing that this holding clearly violated, and is therefore contrary to, the Supreme Court's holding in Smith v. Illinois that "an accused's postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself." 469 U.S. 91, 100 (1984).

A proper discussion of Almonte's argument necessarily requires a thorough analysis of Smith. In Smith, the Defendant was arrested and taken to an interrogation room for questioning by two detectives. Id. at 92. One of the detectives told Smith that he had "a right to consult with a lawyer and to have a lawyer present with [him] when

[he was] being questioned. Id. After being asked if he understood, Smith replied, "*Uh, yeah, I'd like to do that*." Id. at 93. Instead of ceasing the interrogation, the detective(s) pressed ahead, telling Smith that "you either have [to agree] to talk to me this time without a lawyer being present and if you do agree to talk to me without a lawyer being present you can stop any time you want to." Id. Smith then agreed to talk to the detectives and began making incriminating statements. Id. at 93-94. The Illinois Supreme Court held that a consideration of Smith's statements in total amounted to an ineffective invocation of the right to counsel. People v. Smith, 102 Ill.2d 365, 373 (1984). That tribunal placed great significance on Smith's remarks subsequent to his clear request for counsel. Id.

The United States Supreme Court granted Smith's petition for certiorari and reversed the Illinois Supreme Court's decision, finding the statement "*Uh, yeah, I'd like to do that*" to be unambiguous. Smith, 469 U.S. at 96-97. The Supreme Court reasoned that affirming the Illinois Court's decision would entail use of a line of analysis that would be "unprecedented and untenable." Id. at 97. Thus, the Court held that "where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease." Id. at 98. See also Sarourt Nom v. Reilly, 337 F.3d 112, 116-17 (1st Cir. 1998) (explaining that, under Smith, an accused's subsequent statements are relevant to the question of waiver, an inquiry

distinct from the question of invocation of rights.) The Smith decision, therefore, stands for the proposition that where an accused makes an unambiguous invocation of the right to counsel, all questioning must cease, and any post-invocation statements may be used only for the purpose of determining whether the accused has waived his right(s) and not for the purpose of injecting ambiguity into the invocation statement. Therefore, in applying Smith to this case, this Court must determine whether Almonte's alleged verbal invocation of the right to remain silent was of an unambiguous nature such that failure of the police to cease questioning amounted to unconstitutional behavior under Miranda and its progeny.

The SJC concluded that "the defendant did not invoke his right to remain silent" based on its examination of the circumstances immediately before and after where Almonte claims to have made his invocation. Almonte, 444 Mass. at 519. Naturally, Almonte disagrees with the SJC's assessment that his statement was "an isolated" remark," Petitioner's Brief p. 12-14, and cites numerous cases from several jurisdictions where certain remarks were held to have constituted an unequivocal invocation of the right to remain silent.[8] See e.g. United States v. Bushyhead, 270 F.3d 905, 912-13 (9th Cir. 2001) ("*I have nothing to say, I'm going to get the death penalty anyway*"); Arnett v. Lewis, 870 F. Supp. 1514, 1527 (D. Ariz. 1994) ("*There is not much to say*");

[8]Almonte fails to cite a case where "I believe I've said what I've had to say" was held to constitute an unambiguous invocation of the right to counsel or the right to remain silent.

Teemer, 260 F. Supp. 2d at 196 (*"I'm not going to say anything after that"*). Almonte also tries to persuade this Court with United States v. Reid, where Reid told the officer during questioning, "*I have nothing else to say*." 211 F. Supp. 2d at 368-69. Chief Judge Young wrote that the Defendant "invoked his right to remain silent clearly and unambiguously." Id. at 375.

However, there can be no doubt as to the marked difference in precision and clarity between the statements "*I have nothing else to say*" with "*I believe I've said what I've had to say*." Whereas Reid's statement does not need interpretation because any ordinary person surely would understand it to be unambiguous, see Connecticut v. Barrett, 479 U.S. 523, 529 (1987), this Court agrees with the SJC and finds that Almonte's statement was of sufficient ambiguity so as to not require the detectives to cease questioning. The language used by Almonte was not of the same unambiguous nature as the language at issue in the cases he cites above. *"I believe I've said what I've had to say*" is a response indicating full disclosure of information with the police and a personal belief that there is no other information to provide. It is not an outright refusal to continue speaking. Therefore, the Smith rule, demanding cessation of questioning where there is an unambiguous invocation of rights, cannot apply in this factual context.

B. The Supreme Judicial Court's decision was not an unreasonable application of clearly established federal law.

After concluding that the SJC's decision was not contrary to the holding of Smith v. Illinois, this Court must now consider whether the decision was an unreasonable application of established Supreme Court precedent. See 28 U.S.C. § 2254(d)(1); Williams v. Taylor, 529 U.S. at 411. This Court must determine whether the SJC's decision was objectively reasonable, and if it is not, then granting habeas relief would be proper. See Sarourt Nom, 337 F.3d at 116. In making this determination, "we do not focus on the quality of the [state] court's reasoning but rather on the reasonableness of the outcome." Ellen v. Brady, 475 F.3d 5, 9 (1st Cir. 2007).

In determining whether there was an unreasonable application of Smith v. Illinois or other Supreme Court precedent, it is necessary to discuss the First Circuit case of James v. Marshall, which is directly on point. In James, the Defendant was informed of his rights by Sergeant Richard Craig. 322 F.3d at 105. The Defendant intimated that he understood his rights. Id. Sergeant Craig then asked "Do you wish to make a statement at this time" to which the Defendant replied "*Nope*." Sergeant Craig followed up by asking, "Can I talk to you about what happened earlier tonight" and the Defendant replied "*Yup*." The SJC concluded that the trial judge's finding that the Defendant's statement "*Nope*" did not amount to an invocation of his right to silence was not clearly

erroneous. Commonwealth v. James, 427 Mass. 312, 315 (1998). Therefore, in the SJC's estimation, the police were warranted in interrogating the Defendant as to the incident in question absent clear language evincing a desire to remain silent. Id.

The First Circuit affirmed the District Court's denial of habeas relief, finding that Davis was the clearly established federal law in the particular narrow area. James, 322 F.3d at 108-109. Davis explicitly held that "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning." Davis, 512 U.S. at 459. In applying this rule, the James Court agreed with the SJC that the police were under no constitutional mandate to cease questioning after James uttered the word "*Nope*." James at 109.

Similarly, the detectives in the case at hand were not required to cease questioning upon the utterance of the ambiguous phrase "*I believe I've said what I have to say*." The SJC was correct in its determination that the facts and circumstances surrounding the interrogation, in conjunction with the ambiguous assertion, made it reasonable for the detectives to believe that Almonte did not wish to remain silent. While it may have been good police practice to ask clarifying questions where such ambiguous assertions were made, no Court has ever held that such a duty exists on

police interrogators. Davis, 512 U.S. at 461. The SJC properly looked to Almonte's responses when determining if he was invoking his right to remain silent. Under the foregoing analysis, this is a reasonable application of the principles espoused in Davis.

Conclusion

Accordingly, for the reasons articulated above, this Court RECOMMENDS that the District Court DENY Almonte's petition for writ of habeas corpus.

SO ORDERED.

May 15, 2007
Date

/s/ Joyce London Alexander
United States Magistrate Judge

NOTICE TO THE PARTIES

The parties are hereby advised that under the provisions of Rule 3(b) of the Rules

for United States Magistrate Judges in the United States District Court the District Court of Massachusetts, any party who objects to this proposed Report and Recommendation must file a written objection thereto with the Clerk of this Court within ten (10) days of the party's receipt of the Report and Recommendation. The written objections must specifically identify the proportions of the proposed findings, recommendations or report to which objection is made and the basis for such objection. The parties are further advised that the United States Court of Appeals for this Circuit has indicated that failure to comply with this rule shall preclude further appellate review. See Keating v. Sec'y of Health & Human Servs., 848 F.2d 271, 273 (1st Cir. 1988); United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); United States v. Vega, 687 F.2d 376, 378-79 (1st Cir. 1982); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 604 (1st Cir. 1980); see also Thomas v. Arn, 474 U.S. 140, 155 (1985), reh'g denied, 474 U.S. 1111 (1986).

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